

A New State Order: Implications Of Arizona's New Immigration Law

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On April 23, Arizona Governor Jan Brewer (R) signed the nation's toughest and most controversial state immigration bill to date. In response to the furor, on April 30 Governor Brewer signed a follow-up bill (HB 2162) to amend parts of the controversial immigration law. The original "Support Law Enforcement and Neighborhoods Act," Arizona SB 1070, is set to take effect on August 24, 2010 and has ignited a passionate debate, with equally heated opinions expressed in favor of greater enforcement of our immigration laws, and criticism that the law is, on the one hand, pre-empted by the federal immigration laws, and on the other hand, constitutionally suspect. Garnering some of the most emotional responses are its first-ever provisions that make it a crime to be in the U.S. illegally, and give broad authority to local police officers to investigate, detain, and arrest individuals they "reasonably suspect" are in the U.S. without permission.

Not well publicized in the media frenzy are the provisions that impact employers. The new law amends Arizona's Legal Arizona Workers Act (LAWA), the 2007 groundbreaking state law requiring employers to register for and use the federal government's electronic employment verification system, E-Verify. SB 1070 supplements LAWA by creating a new obligation for employers to retain E-Verify records, and establishes a new affirmative defense for knowingly hiring an unauthorized worker if the employer is "entrapped" by law enforcement officers.

Governor Brewer and proponents of the bill argue that Arizona had to resort to its own measures because of the federal system's failure to adequately address the country's immigration issues and problems. The bill describes the intent of the law as deterring the unlawful entry, presence, and economic activity by undocumented individuals in Arizona. Furthermore, the stated purpose of the new law is to perform "cooperative enforcement" of the federal immigration laws, and to "discourage and deter entry or presence" of foreign nationals without authorization to be in the U.S. President Obama swiftly weighed in with his criticism of the new law, although he acknowledged federal



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deficiencies with respect to immigration, saying "Our failure to act responsible at the federal level will only open the door to irresponsibility by others. That includes, for example, the recent efforts in Arizona, which threaten to undermine basic notions of fairness that we cherish as Americans...."

According to the Governor's public statements, the changes made to the bill on April 30 are designed to clarify the intent of the law, and to "make it crystal clear and undeniable that racial profiling is illegal and will not be tolerated in Arizona." Specifically, now the law has been amended to include an explicit phrase, repeated in every section of the law, that a police officer or state agency "may not consider race, color, or national origin in the enforcement of the [law] except to the extent permitted by the U.S. or Arizona Constitution." The amendment states that immigration status may be determined either by a law enforcement officer authorized to verify status, or by an agent of U.S. Immigration and Customs Enforcement.

The follow-on bill removes the word "solely" from the sentence, "The attorney general or county attorney shall not investigate complaints that are based solely on race, color, or national origin." The import is that police officers are prohibited from "solely" using race to investigate an individual's immigration status. In addition, it revises the provision that allows a law enforcement officer to investigate someone's immigration status if they have reasonable suspicion that the person is in the U.S. illegally. The amendment also replaces the phrase "lawful contact" by the police officer with the phrase, "stop, detention, or arrest," making apparent that a police officer need not question a crime victim or a witness about her immigration status. Opponents to the law vehemently argue that these amendments are insufficient to prevent civil rights abuses, and that the Governor was simply forced to sign off on the changes because of mounting pressure of impending economic boycotts of the state.

The follow-on bill did not amend any of the sections aimed at employers in Arizona.

Below we provide an overview of the key provisions of the Arizona law:

- Police officers are required to make a "reasonable attempt," when practicable, to determine an individual's immigration status when there is "reasonable suspicion" that the individual is unlawfully present in the U.S.

While the law also provides that a law enforcement official "may not solely consider race, color, or national origin," immigrant activists and the Latino community have argued that the

"reasonable suspicion" standard opens the door to racial profiling by police. In response, the Governor has said she will establish law enforcement training to implement Arizona's immigration laws. Many question whether such training alone could be efficacious in light of the law's imperative, and its broad evaluation standards. What creates a "reasonable suspicion" someone may not be in the U.S. lawfully? Their skin color, their accent, their geographical location? While the follow-on bill amends the law to say that racial profiling is not permissible, it does not specifically address this point.

- The law includes a presumption that a person who presents a valid Arizona driver or non-operating license, a valid form of tribal identification; or other form of federal, state, or local issued identification that evidences his/her legal immigration status, is lawfully present. This is tantamount to a requirement that all people in the state of Arizona – whether a foreign born or not, whether a U.S. citizen or not – carry their identification at all times.

- The law creates a state requirement, and penalty for failure to comply, that foreign nationals register their addresses with the government and carry registration/alien documents at all times. These requirements are in addition to the federal immigration laws already in place on these points. The amendments signed by Governor Brewer last Friday amend and remove some of the serious monetary fines, jail sentences, and felony consequences instituted by the original law. Under the revised bill, the first violation of this requirement would be classified as a Class 1 misdemeanor, punishable with a maximum fine of \$100. Second violations may result in a jail term of no more than 20 days, and subsequent violations are punishable for no longer than 30 days in jail. The American Civil Liberties Union and other activist organizations argue that these provisions are a "back door" attempt to create state arrest authority for immigration violations, which is in clear violation of the Supremacy Clause of the U.S. Constitution.

- The new law also creates a private right of action for any Arizona citizen to sue any Arizona agency, county, city or town that implements a policy that restricts the enforcement of federal immigration laws. A court may order civil penalties of \$1,000 to \$5,000 for each day that the agency or municipality has been found in violation of the law. Opponents of the law warn that

these provisions may subject local governments to various frivolous and expensive law suits filed by private citizens with anti-immigrant agendas.

- The law prevents day laborers from seeking work, by making it a Class 1 misdemeanor for an undocumented individual to apply for or solicit work in a public place. The law even goes as far to define "solicit" as a verbal or nonverbal communication made by a gesture or a nod.

- As mentioned above, the new law amends LAWA, which already requires all employers to utilize E-Verify, the federal government's electronic employment eligibility verification system. When the new law goes into effect, employers will be required to maintain E-Verify records for the duration of the employee's employment or at least three years, whichever is longer. There is no similar federal mandate for employers participating in the E-Verify program, but all employers have an obligation to maintain I-9 Identify and Employment Eligibility Verification records for three years after the date of hire, or one year after employment ends, whichever is later.

- In addition, the law provides a new affirmative defense for employers who may be charged for knowingly employing an unauthorized worker. Employers may assert an "entrapment" defense if they can prove by a preponderance of the evidence that the idea of committing the offense started with the law enforcement officers.

Early predictions of speedy legal challenges to the constitutionality of the law, and to block its implementation, have been borne out. The first two suits were filed on April 29: the first, *National Coalition of Latino Clergy & Christian Leaders v. Arizona*, D. Ariz., CIV 100943-PHX, complaint filed 4/29/10, contends that the law is unconstitutional, and requests an injunction to prevent its implementation while its legality is challenged. The second suit was filed by a Hispanic police officer in Tucson who contends the law itself was created out of racial bias, as well as challenging its constitutionality (*Escobar v. Brewer*, D. Ariz., No. 4:10-cv-00249-DCB, complaint filed 4/29/10).

From protests to travel boycotts, reaction to Arizona's new immigration law has been undeniably intense. Mexico has issued a travel warning that "all Mexican citizens could be bothered or questioned without motive at any moment." The fear of rampant copy-cat laws may turn into a reality – Texas Republican legislators have already announced that they plan to introduce immigration measures similar to the new law in Arizona, and reportedly so will conservative Oklahoman lawmakers.

As the debate unfolds, Proskauer's Immigration and Nationality group will continue to provide updates and analysis of the law, its import, and the obligations of employers in Arizona, and around the country.

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